PLEADING—NECESSITY FOR TIMELINESS OF PLEADINGS—REMOVAL CLAUSE IN REGARD TO FEDERAL JURISDICTION

On February 5, 1954, plaintiff, a citizen of New York, commenced a personal injury action in a New York state court against defendant, a citizen of New Jersey. The complaint was served on November 20 and, by stipulation, the time of defendant to move or answer was extended to January 20, 1955. On January 19 defendant filed a petition and bond for removal to the U. S. District Court for the southern district of New York. On February 9, after removal to federal court, plaintiff filed a motion to remand to the state court for lack of jurisdiction on the sole ground that defendant was not truly a citizen of New Jersey. The motion was denied and on May 5 plaintiff's request for a jury trial was refused because of failure to make the request within ten days after having received notice of defendant's petition for removal to federal court. On June 29 plaintiff then filed a motion to remand to the state court on the ground that defendant had failed to file his petition for removal within twenty days after receipt of a copy of the initial pleading, as required by 28 U. S. C. §1446 (b) (1952). *Held*: Motion to remand denied. The requirement of the removal statute as to time was mandatory, but not jurisdictional. The stipulation of the parties extending defendant's time to answer or move to the complaint did not permit an extension of the period of time in which the petition for removal could be filed. However, even though the case may have been improvidently removed in the sense that the petition for removal was not filed within the time prescribed by statute, that was not a jurisdictional defect. The plaintiff's original motion to remand made no mention of the defendant's untimely filing; affirmative action in the federal court on the part of the plaintiff in filing a request for a jury trial has estopped him to assert any right to remand to the state court. *Green v. Zuck*, 133 F. Supp. 436 (S.D. N. Y. 1955).

Prior to 1948 the removal provision required that the petition be filed "at any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead." 36 STAT. 1095, 28 U. S. C. §72 (1911). The revision of the Judicial Code in 1948 made various changes in the removal procedure. Section 1446 (b) of Title 28 provided that the petition was to be filed "within twenty days after the commencement of the action or service of process whichever was later." 62 STAT. 939 (1948). This statute was amended in 1949 so that, at the present time, the petition must be filed "within twenty days after the receipt by the defendant of a copy of the initial pleading, or within twenty days after the service of summons if the initial pleading is not required to be served on the defendant, whichever period is shorter." 63 STAT. 101 (1949).

Before the revision of 1948 there was a conflict as to whether a stipulation between the parties or a court order extending the defendant's time to answer or otherwise plead, was effective to extend the time for

removal to federal court. A majority of the courts held it did not. See cases cited in 3 MOORE'S FEDERAL PRACTICE, §101.12, p. 3525, footnote 26 (1938). For cases holding to the contrary see *Anthony, Inc. v. National Broadcasting Co.*, 8 F. Supp, 346 (S.D. N. Y. 1934) and cases cited therein. The minority courts held that the defendant was not required to answer or plead within the meaning of the statute until expiration of the court order. *Hansford v. Ordean Wells Co.*, 201 Fed. 185 (Mont. 1912). After the revision of 1948 the U. S. District Court for the southern district of New York repudiated its former view that a stipulation or court order would automatically grant extension. *Dutton v. Moody*, 104 F. Supp. 838 (S.D. N. Y. 1952). That case held that Congress intended to achieve nationwide uniformity as to the period in which a petition for removal could be filed; thus, the rationale of the former rule was destroyed because the statute was no longer framed in terms of time to answer, but prescribed a specific time period.

It seems reasonably clear that this interpretation of Congressional intent is the correct and logical one. However, there is some disagreement as to whether the Congressional purpose was wise. See Keeffe, *Venue and Removal Jokers in New Judicial Code*, 38 VA. L. REV. 569 (1952). This article points out that the rigidity of the rule may work some injustices, particularly in the case of non-resident motorists. In such a situation process is usually served on a state official acting as implied designee. Although notice is then mailed to the defendant's last known address, service of process is considered complete when the implied designee is served and the twenty day period begins to run. The result is that the defendant has little time to appraise his position and decide whether or not to request removal to federal court. However, some courts, such as the U. S. District Court for the southern district of Ohio, have taken the view that service is not complete and the twenty day period does not begin to run until the defendant has received actual notice. *Moon v. Makowski*, 114 F. Supp. 914 (S. D. Ohio 1953). For other cases in accord and to the contrary see *Mahony v. Witt Ice and Gas Co.*, 131 F. Supp. 564 (W.D. Mo. 1955) and cases cited therein.

The principal case has much support for its proposition that "mandatory" is not synonymous with "jurisdictional." Professor Moore says: "Under the prior practice the time limitation on removal was said not to be jurisdictional, but merely modal and formal; and this rule is equally applicable under the new code." MOORE'S COMMENTARY ON THE U. S. JUDICIAL CODE, §0.03 (42), p. 273 (1949). For case authority prior to 1948 see *Ayers v. Watson*, 113 U. S. 594 (1894) and *Powers v. Chesapeake and O. R. Co.*, 169 U. S. 92 (1898). Recent cases which hold that the time limitation is modal, not jurisdictional, and subject to waiver are: *Kramer v. Jarvis*, 81 F. Supp. 360 (Neb. 1948); *Hamilton v. Hayes Freight Lines*, 102 F. Supp. 594 (E.D. Ky. 1952); *Fisher v. Exico Co.*, 13 F. R. D. 195 (E.D. N. Y. 1952). If there is diversity of

citizenship and the amount in controversy is more than $3000, the requirements of federal jurisdiction are met. For this reason 28 U. S. C. §1447 (c) (1952), which provides that if the case has been improvidently removed and without jurisdiction the federal court shall remand to the state court, has no application.

There is justification for the point of view taken by these courts. In all fairness to both parties there ought to be a point at which the plaintiff can no longer attack the procedure by which removal to the federal court was made. The litigants can then devote their energies and efforts to the merits of the case. See FED. R. CIV. P. 12 (h), which provides only one opportunity to make certain objections as to matters of procedure.

Jacque W. Pierce

AGENCY—CONTRIBUTORY NEGLIGENCE OF SON WHOSE APPLICATION FOR AN OPERATOR'S LICENSE SIGNED BY FATHER BARS SUIT BY FATHER AGAINST THIRD PERSON UNDER OHIO REV. CODE §4507.07

This is an action by plaintiff to recover damages to his automobile which was being driven by his minor son when the accident occurred. The plaintiff had signed his minor son's application for an operator's license. The accident was caused by the combined negligence of both the son and the defendant. From an adverse judgment in the trial court, the plaintiff is appealing to the Court of Appeals. *Held*, under OHIO REV. CODE §4507.07 which imputes negligence of a minor motorist to the person signing the minor's application for an operator's license, the contributory negligence of the son is imputed to the plaintiff so as to bar his suit. *McCants v. Chenault*, 98 Ohio App. 529, 130 N.E. 2nd 382 (1954).

At common law there are two requirements for an imputation of negligence from a tortfeasor to an innocent person: the tortfeasor must be a representative of such person acting within the scope of his employment and must be subject to a right of control by such person at the time of the tort. *Babbitt v. Say*, 120 Ohio St. 177, 165 N.E. 721 (1929); *Higbee Co. v. Jackson*, 101 Ohio St. 75, 128 N.E. 61, 14 A.L.R. 131 (1920). This general rule is also applicable to an imputation of contributory negligence. *Cincinnati Street Railway Co. v. Wright, Adm'r.*, 54 Ohio St. 181, 43 N.E. 688 (1896).

The courts in the majority of the jurisdictions take the view that a family relationship such as husband and wife or parent and child standing alone is not enough for the imputation of negligence. The courts reason that such a relationship does not meet the tests of a person acting within a scope of employment and subject to a right of control. *Davis v. Guarnieri*, 45 Ohio St. 470, 15 N.E. 350 (1887); *Neal v. Rendall*, 98 Me. 69, 56 Atl. 209 (1903).

With the advent of the automobile and the ever-increasing risk of damage to persons and property arising out of its operation, some states, either through decisional or statutory law, have departed from these gener-

al requirements for the imputation of negligence and have formulated certain specific rules with regard to the operation of motor vehicles.

The "family purpose" doctrine is found in about half of the American jurisdictions. The courts following this doctrine hold that the owner of an automobile who permits members of his family to drive it for their own convenience is liable for the negligence of such person on the ground that the owner has made such a family purpose his "business". This theory is based on the fiction that the owner has his automobile for the purpose of providing pleasure for his family, and that whenever any member of his family is driving it, he is furthering the owner's interest and is therefore his agent. *King v. Smyth*, 140 Tenn. 217, 204 S. W. 296 (1918); *Dibble v. Wolff*, 135 Conn. 428, 65 A. 2d 479 (1949); Lattin, *Vicarious Liability and the Family Automobile*, 26 MICH. L. REV. 846 (1928); PROSSER, TORTS, p. 369 (2d ed. 1955).

Other jurisdictions have rejected the "family purpose" doctrine and have held that in order for liability to attach to the owner of an automobile because of the negligence of the driver, the driver must actually be an agent or a servant of the owner acting within his scope and subject to an immediate right of control by the owner. *Trice v. Bridgewater*, 125 Tex. 75, 81 S.W. 2d 63, 100 A.L.R. 1014 (1935); *Anderson v. Byrnes*, 344 Ill. 240, 176 N.E. 374 (1931); *Bretzfelder v. Demaree*, 102 Ohio St. 105, 130 N.E. 505 (1921).

There are several types of statutes which attempt to solve this problem. In some states it is provided that a lessor of motor vehicles is responsible for damage done through the negligent driving of a lessee. CONN. GEN. STAT. §2479 (1949); ME. REV. STAT. c.22 §157 (1954). Some states have passed statutes providing that an owner of a motor vehicle is liable for damage caused by a minor below a certain age operating the vehicle with the owner's consent. ME. REV. STAT. c.22 §156 (1954); DEL. CODE ANN. Tit. 21 §6106 (1953); IDAHO CODE §49-1003 (1949). In other jurisdictions there is legislation making the automobile owner liable for injuries to third persons caused by the negligence of any person, whether a member of the family or not, who is operating the automobile on the public highway with his consent. N. Y. VEHICLE AND TRAFFIC LAW §59; IOWA CODE §321.493 (1950). Other states have statutes like that involved in the principal case providing that the person who signs a minor's application for a driver's license is liable for the negligence of the minor. DEL. CODE ANN. tit. 21 §§2710, 6105 (1953); OHIO REV. CODE §4507.07 (1953).

Jurisdictions having a statute of the type which makes the owner liable for any injuries to third persons caused by the negligence of any person operating the automobile with his consent differ as to whether the contributory negligence of the driver is imputed to the owner so as to bar his suit against a negligent third person. The Iowa Supreme Court has held that such a statute is broad enough to cover *all* the legal relations of

principal and agent and that since the negligence of an agent is imputed to a principal under circumstances stated above, an owner's suit is barred by the negligence of the driver. *Secured Finance Co. v. Chicago Rock Island & Pac. Ry.*, 207 Iowa 1105, 224 N.W. 88, 61 A.L.R. (1929). Delaware, Minnesota, and New York, however, follow the view that such a statute applies only for the purpose of holding the owner liable to the person injured and does not make the driver's contributory negligence imputable to the owner in an action against a third person. These states have held that the purpose of such a statute is only to provide for the establishment of financial responsibility of the owners of motor vehicles and not to create a general principal-agent relationship. *Westergreen v. King*, 99 Atl. 2d 356 (Del. 1953); *Jacobsen v. Dailey*, 228 Minn. 201, 36 N.W. 2d 711, 11 A.LR. 2d 1429 (1949); *Mills v. Gabriel*, 259 App. Div. 60, 18 N. Y. S. 2d 78, *affirmed*, 284 N. Y. 751, 31 N.E. 2d. 512 (1940).

The principal case seems to be the only reported decision considering whether under the Ohio type of statute, *i.e.*, one imputing negligence of a minor to the person signing the application for the minor's driver's license, the contributory negligence of the minor is imputed to the signer so as to bar a suit by the signer. The Court states at page 530:

> We believe the Legislature intended joint and several liability in all its implications not only in money damages to an injured third party, but that, having placed a potentially dangerous instrumentality in the hands of a minor, the person responsible therefor should stand in exactly the same position as the minor and be clothed with the imputation of negligence for all purposes.

It is submitted that the Court in this case took out of context the paragraph of the statute imputing the negligence of the minor to the signer. This is indicated by the court's failure to read it in conjunction with a following provision of the same statute which states that on proof of financial responsibility of the minor such person signing the application is not subject to the liability. The combination of these two provisions seems to indicate that the legislative intent in passing the statute was to provide more certain compensation in money damages for a third person injured by a minor motorist and not to bar an action by the signer under the circumstances of the principal case.

T. Bryan Underwood, Jr.

TORTS—NEGLIGENCE—INTERVENING AGENCY CAPABLE OF ELIMINATING EXISTING HAZARD

Action by plaintiff to recover damages for injuries received when a forging crashed through his car windshield after falling from a passing truck. Ford Motor Co. operated a forge plant in Canton, Ohio, and there packed and loaded forgings to be shipped to Detroit, Michigian on a tractor-trailer unit of Rogers Transportation Co. En route, the driver

observed forgings falling from the truck and stopped to repair the broken box which he found on the trailer. To accomplish the repair he knocked boards off two other pallet boxes, one containing forgings similar to the one which struck the plaintiff, and nailed them onto the broken box. After continuing for some distance, the driver stopped to check his load and found forgings, resembling the one found in plaintiff's car, lying loose on the bed of the trailer. The court assumed, on the theory presented, that Ford was negligent, and *Held:* Rogers was a responsible intervening agency, "which, after becoming conscious of the hazard, could and should have eliminated it, and by not doing so broke the chain of causation between Ford's negligence and the injury." *Hurt v. Rogers Transportation Co.; Ford Motor Co., Appellant,* 164 Ohio St. 323, 130 N. E. 2d 824 (1955).

The court of common pleas, which granted a motion for judgment *non obstante verdicto,* was affirmed. The case in the lower courts dealt chiefly with problems of proof. Specifically, the problem was whether the forging slipped *through* the negligently constructed box, or *bounced out* as a result of the driver's removing the upper most slap. Under the view of the case taken by the court, after the situation had been discovered the origin of the forging was of no consequence. The appellate court held that reasonable minds could find the forging had slipped *through* the slats, thus posing a jury question which the trial court improperly took from the jury's province. This does not appear from the opinion to have been considered by the Supreme Court. Forgings had slipped between the slats on previous occasions, a fact of which Ford was aware. The court disposed of the contention that Ford could be held to foresee the natural and probable results of its negligence with the statement that "having accepted the load, Rogers' transportation thereof and its own attempt to remedy the defect relieved Ford of any responsibility it may originally have had." The attempt to correct the discovered defects thus was held to insulate Ford from liability for subsequent injuries to the plaintiff, irrespective of the possible, even probable, foreseeability thereof.

The court placed the principal case within the rule of the *Thrash* case: "Moreover, *in the circumstances of this action* the U-Drive-It Company may invoke the rule that, where there intervenes between an agency creating a hazard and an injury resulting from such hazard another conscious and responsible agency which could or should have eliminated the hazard, the original agency is relieved from liability. A break in the chain of causation thereby takes place which operates to absolve the original agency." *Thrash v. U-Drive-It Co.,* 158 Ohio St. 465, 110 N.E. 2d 419 (1953). Circumstances of the principal case were held to be such that Ford could invoke the above rule. Justification on this basis can be refuted by a glance behind the rule, disclosing serious weaknesses in it.

"The defendant ordinarily will not be relieved of liability by an

intervening cause which could reasonably have been foreseen, nor by one which is a normal incident of the risk created." PROSSER, HANDBOOK ON THE LAW OF TORTS 266 (2d ed., 1955). "The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if (a) the actor at the time of his negligent conduct should have realized that a third person *might so act*, or (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it highly extraordinary that the third person had so acted, or (c) the intervening act is a *normal response to a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.*" 2 RESTATEMENT OF THE LAW OF TORTS 447 at 1196. (Emphasis added.) Upon reflection, the *Thrash rule* is found to be inadequate because of the omission of any consideration of natural and foreseeable consequences, a necessary segment of any supervening negligence rule.

There are hundreds of cases which involve the question in point; it would be mere surplusage to belabor them all. A leading Ohio case is *Pennsylvania R. R. Co. v. Snyder*, 55 Ohio St. 342, 45 N.E. 559 (1896). The defendant had delivered a box car to plaintiff's employer to be shipped to Detroit. Defendant was negligent in not repairing the ladder upon which employees were to stand, but Snyder's employer was also negligent in failing to inspect before putting the car into operation. The court held defendant liable because the negligence of the immediate employer was not an efficient intervening cause, for the defendant could apprehend the result as the natural and probable consequence of his negligence. The similarity between the *Snyder* case and the principal case is striking, though they are not precisely the same. In *Gedeon v. East Ohio Gas Co.*, 128 Ohio St. 335, 190 N.E. 924 (1934), the defendant's driver stopped his car at the curb, opened the car door on the driver's side, and jumped out into the stream of traffic without looking. As he jumped in front of an approaching automobile, the driver of the automobile swerved his car to avoid the the defendant's driver and went completely across the road and onto the sidewalk where he struck the plaintiff. In holding that the plaintiff could recover against the Gas Company, the court stated that a "tort feasor can be held legally responsible only for the probable consequences of his act . . . By probable, however, is not meant 'more likely than not,' but rather 'not unlikely' or such a chance of harm as would induce a prudent man not to run the risk, such a chance of harmful result that a prudent man would foresee an appreciable risk that some harm would happen." Thus, in the principal case Ford was bound to foresee some risk of harm after it had been warned that forgings had been falling from its boxes and when it knew or should have known that upon falling from the truck those forgings could injure an innocent person. The defendant's driver in *Pugh*

v. Akron-Chicago Transportation Co., 64 Ohio App. 479 (1940), had blocked the road with his truck during efforts to repair it. While the plaintiff's car was waiting behind the truck, another car struck him from the rear forcing plaintiff into the truck. The court held that as a matter of common knowledge the defendant's truck driver could have reasonably anticipated such collision as a not entirely improbable result of obstructing the highway. *Neff Lumber Co. v. Bank*, 122 Ohio St. 302, 171 N.E. 327 (1930); *Mudrich v. Standard Oil Co., et al.*, 87 Ohio App. 8, 86 N.E. 2d 324 (1949), and *Callahan v. N.Y.C. Ry Co.*, 22 Ohio Op. 164, 37 N.E. 2d 620 (1942) are a few of the many other cases in Ohio dealing with the problem of proximate cause.

The general rule seems clearly to include a consideration of foreseeability and natural and probable consequences. The reasonable inference to be drawn from the court's remarks in the principal case that ". . . Rogers was a responsible intervening agent which, after becoming conscious of the hazard, could and should have eliminated it, and by not doing so broke the chain of causation . . ." is that Ford would have been absolved of liability regardless of the origin of the forging because the driver discovered the hazard. A jury could reasonably have found the driver's actions were not highly extraordinary under the circumstances, and that Ford could have reasonably foreseen that a truck driver would attempt to repair, with whatever tools he may carry with him, the negligently constructed box. It would not be unreasonable to present such a question of proximate cause to the jury, assuming as we do that it is a problem upon which reasonable minds could differ.

A more sensitive appreciation of the developments in negligence law and a wiser application of its principles would have led to a contrary decision in the principal case. Clarification of the principles of negligence law is a much desired end for which modern courts should strive.

David A. Katz

CRIMINAL LAW — REFUSAL OF DEFENDANT TO SUBMIT TO INTOXICATION TEST IN PROSECUTION FOR DRUNKEN DRIVING

Defendant was arrested by a member of the Columbus Police Department and taken to police headquarters where he was charged with violation of a city ordinance against operating a motor vehicle while intoxicated. While at the headquarters, defendant was asked to submit to a urinalysis and blood test to be given by the police chemist to determine the extent of defendant's intoxication. Defendant refused the request unless his physician were present or would give the test. No response was made to this conditional answer and no test was made. At the trial the police chemist was called as a witness by the prosecution and testified at length as to his experience in administering such tests, the scientific principles involved and the infallibility of the tests to determine the extent of intoxication. Counsel for the defendant objected to the admission of

this testimony, but was overruled. *Held:* the refusal of the defendant to submit to a urinalysis test unless his physician were present was reasonable and does not lay the foundation for any inference of an admission of guilt. Under such circumstances, it was prejudicial error for the trial court to admit the testimony of the police chemist as to the infallibility of the intoxication test. *City of Columbus v. Mullins*, 162 Ohio St. 419, 123 N.E. 2d 422 (1954).

In recent years the question of the use of scientific tests to determine the extent of intoxication and the admissibility in evidence of the results has been litigated by the courts in many states. Heretofore, the issues raised have fallen into one of several categories. When a party voluntarily submits to such a test the courts have consistently held the results thereof admissible in evidence. *City of Columbus v. Thompson*, 55 Ohio L. Abs. 302, 89 N.E. 2d 604 (1949); *State v. Morkid*, 286 N.W. 413 (Iowa 1939); *State v. Duguid*, 50 Ariz. 276, 72 P. 2d 435 (1937). *But see*, *Halloway v. State*, 146 Texas Crim. 353, 175 S.W. 2d 258 (1943). The most controversial group of cases involves the admissibility of the fact of a party's refusal to submit to the test. In this area the courts have differed in their application of the privilege against self-incrimination in criminal actions when the prosecution attempts to comment on the party's refusal. *State v. Benson*, 230 Iowa 1168, 300 N.W. 275 (1941); *Apodaca v. State*, 140 Texas Crim. 593, 146 S.W. 2d 381 (1940); *State v. Gratton*, 60 Ohio App. 192, 20 N.E. 2d 265 (1938). See also, OHIO CONST., ART. I § 10; 8 WIGMORE, EVIDENCE § 2265 (3rd Ed. 1940). The question of admissibility of evidence received from an unreasonable search and seizure has been raised in a third class of cases where the specimen was taken from defendant at a time when he was not able to consent to or resist the action. *Block v. People*, 125 Colo. 36, 240 P. 2d 512 (1952), *cert. denied* 343 U.S. 978 (1952); *State v. Weltha*, 228 Iowa 519, 292 N.W. 148 (1940). See also *Rochin v. California*, 342 U.S. 165 (1952). The instant case raises a new question, that is, the existence of a middle ground position between a voluntary submission and an absolute refusal to submit to an intoxication test. It appears from a review of the cases that the Ohio court in the instant case was the first to raise and pass on the legal merit of a reasonable refusal to undergo such a test.

In the absence of any case law in point, it is necessary to look to other areas of the law to endeavor to determine by comparison and analogy the proper legal position on the point. Rule 35 (a) of the Federal Rules of Civil Procedure provides in part: "In an action in which the mental or physicial condition of a party is in controversy, the court . . . may order him to submit to a physical . . . examination by a physician . . ." 28 U.S.C. § 4323. A few states have enacted similar legislation, while in others it has been held that the courts have an inherent power to order an examination when it becomes necessary to serve the

ends of justice. *S. S. Kresge Co. v. Trester*, 123 Ohio St. 383, 175 N.E. 611 (1931); *Wittenberg v. Onsgard*, 78 Minn. 342, 81 N.W. 14 (1900). The courts have insisted, however, that such examination be conducted by an impartial, competent physician. Where it was shown by the party ordered to submit to the examination that the examination would be injurious to his health, the court deemed the condition unreasonable and refused to grant the order. *Distler v. John Shilito Co.*, 26 Ohio L. Abs. 430, 11 Ohio Opp. 181 (1941). So too, when the party showed that the examination would be excessively painful and dangerous, the court refused to compel such action. *Carrig v. Oakes*, 18 N.Y.S. 2d 917, 259 App. Div. 138 (1940). In several cases where the party was ordered to undergo a physical examination, the patient has requested that his physician be present at that time and the courts have allowed this request, holding it to be a reasonable one. *Pollard v. Page*, 56 Ga. App. 503, 193 S.E. 117 (1937); *Willams v. Chattanooga Iron Works*, 131 Tenn. 638, 176 S.W. 1031 (1915). These cases are distinguishable on the facts from the instant case, but the manifest principle is analagous.

Although the reasonable request in the principal case was to have the party's own physician during the administration of the test, there is another area in which the problem may well arise, that is, the right to consult counsel generally over the telephone, but in person if his presence can be had immediately before submitting or refusing to submit to the test. The right of an accused party to counsel is deemed fundamental to our system of justice, U. S. CONST., Amend. VI, but in the application of this principle to the states, through the Fourteenth Amendment, the right has not been extended as far as seems desirable. Thus, some states have enacted legislation extending the scope of this right. In Ohio it appears that a party charged with a crime has a right to confer privately with his legal adviser at all reasonable times. *Snook v. State*, 34 Ohio App. 60, 170 N.E. 444 (1929). It is provided in OHIO REV. CODE § 2935.17 that "A court or magistrate must allow an accused a reasonable time to send for counsel, and for that purpose may postpone the examination." Correlatively, OHIO REV. CODE, § 2935.16 states that "After arrest of a person . . . any attorney at law . . . may, at the request of the prisoner . . .immediately visit the person arrested and consult him privately . . ." The right to consult counsel immediately is particularly important in these cases because of the liberal interpretation most courts have given to acts allegedly constituting a voluntary submission to an intoxication test, and further, because of the different treatment by the courts of the accused's refusal to submit. Therefore, it appears that a request by the party to consult counsel before he is required to consent or refuse to submit to an intoxication test should and would be deemed a reasonable one.

In any attempt to determine the bounds of reasonable requests as a condition precedent to submission to a scientific intoxication test, we must consider the scientific aspects of the problem. It is obvious that the com-

pliance with a reasonable request necessary involves a delay in time before the party produces the specimen for analysis, and the lapse of time between the arrest and taking the specimen will have a direct relation to the alcoholic content found in the body. Alcohol begins to oxidize in appreciable quantities soon after absorption, often within five or ten minutes. 39 J. CRIM L. & C. 225 (1945). This oxidation takes place only in the blood stream and thus the alcohol content in the urine will not be disturbed. However, when the alcohol content or build-up in the urine is greater than that in the blood stream, the alcohol will pass out of the bladder and become diffused into the blood stream where it will be oxidized. There is no way to determine at any given time the relative content of alcohol in the blood or in the urine, save by taking a sample of each. It is known that although the build-up in the blood is more rapid, by the time a peak of alcoholic saturation is reached by a person, the alcohol content in the urine will exceed the content in the blood by a five to four ratio. The problem is further complicated by the fact that the rate of oxidation varies with the individual on the basis of size, activities, degree of saturation and other lesser factors. Several states have taken cognizance of these facts and require that the specimen be taken within two hours after arrest to be admissible in evidence. N. Y. VEHICLE & TRAFFIC LAW, ART. 5, § 70 (5); WIS. STAT. § 85.14 (4). It is generally agreed that such provisions materially increase the accuracy of the test.

The established practice of police chemists and others administering the test is to take a specimen from the accused as soon as he is brought in and to determine the percent of alcohol by weight in the system as of that time. Any lapse of time while a reasonable request is being granted would necessarily mean greater oxidation of the alcohol in the system and the test therefore would not reflect the party's true state of intoxication. It is recognized that juries place great reliance on the scale for measuring the extent of intoxication in terms of the percentage of alcoholic content in the body set forth by the National Safety Council's Committee on Tests for Intoxication, and some states have written this scale into their traffic laws. N. Y. VEHICLE & TRAFFIC LAW, *supra;* WIS. STAT., *supra.* This scale states that an alcoholic content of under .05% by weight is prima facie evidence that the party is not intoxicated, .06 to .14% is substantial evidence but raises no inference, and .15% or higher is prima facie evidence that the party is intoxicated.

One possible solution compromising the right to reasonable requests and the consequent time lapse with the necessity for determining the alcoholic content at a time as near the arrest as possible, would be to allow the police chemist to take two specimens, one hour apart, after the request has been granted. The difference in the content would represent the minimum hourly rate of oxidation in the person. With this figure it would be possible to calculate back from the time of the first test to determine the alcoholic content in the accused at any time after he had

ceased consumption. Since the rate of oxidation is highest at the time of peak saturation and diminishes with lesser content, the rate as determined by the two tests, when used to calculate a prior state of intoxicattion could work only for the benefit of the party. This practice is used in some cases now, but a widespread application would depend on its reconsiliation with the provisions of the New York and Wisconsin laws for taking the test within two hours after arrest.

The Supreme Court in the principal case has opened up a novel point of law. Although the implications are quite broad, the court disposed of the matter in a one sentence paragraph, prefaced with the phrase "in our opinion" and without any treatment of the relevant legal or scientific problems. The situations are perhaps limited in which a person accused of being under the influence of alcohol might make a reasonable request as a prior condition to submission to a scientific intoxication test. Nevertheless, there is an apparent need for a consideration of the various factors involved and the setting forth of some guiding tests and principles, lest the reasonable request becomes a dodge of the accused to delay and thus lessen his chances of conviction.

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